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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 80

JOHN HENRY HARMON, III, *Petitioner,*

v.

WILBER M. BRUCKER, individually and as Secretary of the Department of the Army, *Respondent.*

PETITIONER'S REPLY BRIEF

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No. 777

JOHN HENRY HARMON, III, *Petitioner*,

v.

WILBER M. BRUCKER, individually and as Secretary of the Department of the Army, *Respondent*.

PETITIONER'S REPLY BRIEF

STATEMENT

Respondent's brief in opposition to the Petition for Certiorari argues extensively that no legal injury has been caused petitioner by respondent's issuance to him of a General Discharge Under Honorable Conditions (*Res. Br.* 8-11). We disagree. The General Discharge proffered petitioner jeopardizes him not only in his profession, his job opportunities and his reputation, it also extinguishes his right to valuable benefits provided veterans by the laws of the State of New York. In *Peters* v. *Hobby*, 349 U.S. 331, this Court said that

"substantial rights affecting the lives and property of citizens are at stake." *Id.*, at p. 347. They are at stake here, too.[1]

I

A "General (under honorable conditions)" discharge is not an "Honorable" discharge. See, *AR 615-360, par's. 7-9* (Pet. App. 30-32). While a "General" discharge does not automatically deprive petitioner of Federal veterans' benefits, he will nonetheless be deprived of various and substantial benefits provided veterans by the State of New York. For example, only veterans holding "Honorable" discharge certificates or their wives, widows and minor children may be entitled to certain burial benefits, *N.Y. Gen. Mun. L.*, § 148; the children of only those veterans holding "Honorable" discharge certificates may be entitled to state educational scholarships, *N.Y. Educ. L.*, § 609; only veterans holding "Honorable" discharge certificates may be entitled to retire at a younger age than others from the school system, *N.Y. Mil. L.*, § 245; and only "Honorable Discharge" certificates or "Honorable Service" certificates may be recorded so as to put public officials on notice of the facts set forth therein, *N.Y. Mil. L.*, § 250. To say, therefore, that petitioner would not be injured by the award of a "General Discharge Under Honorable Conditions," rather than an "Honorable Discharge,"

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[1] Indeed, it appears that the court below twice rejected respondent's contention. The first time was on August 17, 1956, when it denied respondent's suggestion of mootness (R. 120); the second time, as Judge Bazelon points out, when in dealing with the question of jurisdiction, "it [seemingly] rejected the contention that there is no longer a judically cognizable case or controversy" (Pet. App. 52, ftn. 7). Cf. *Friedman* v. *International Association of Machinists* (C.A. D.C.), 220 F. 2d 808, 810, cert. den., 350 U.S. 824.

is to disregard the plain and unmistakable provisions of applicable state statutes and the tangible benefits for which they provide.[2] But more important than the loss of the tangible benefits to which we have adverted is the stigma attached to anything other than an "Honorable Discharge." To say that no stigma attaches to the "General Discharge Under Honorable Conditions" is to hide from reality. Or, as Judge Bazelon put it in his dissent below:

> "But whatever may be said of the technical legal equivalence or difference between the two types of discharge, from a real-life point of view they are vastly different. The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than 'honorable.' This is, of course, confirmed by the statement of [respondent's] counsel in oral argument that 'every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable.'" (Pet. App. 53.)

These facts have been recognized by the recent decision in *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, where the late Judge Jerome Frank noted plaintiff's argument that a "less than honorable discharge may have important adverse effects on a veteran's eligibility for various benefits under federal and state law,[3] and on his success in obtaining private or govern-

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[2] In this connection, it will be noted that the New York statutes make a marked distinction between an "honorable discharge" and a discharge "under honorable conditions." See, *e.g.*, and compare *N.Y. Educ. L.*, § 608 with *N.Y. Educ. L.* § 609. Cf. *Ops. Atty. Gen.* (N.Y.), 51 St. Dept. 281, 291 (1934).

[3] *Id.*, 234 F. 2d 135, ftn. 2.

mental employment.[4] * * * Besides this direct pecuniary harm, it involves a social stigma likely to harm plaintiff substantially. * * * Such effects may be aggravated by the requirement that the discharge papers of persons who do not complete their normal tour of duty, but are separated pursuant to AR 604-10 * * *, contain the statement 'AR 604-10 applies,' thus publicly proclaiming that the Army considers such persons to be security risks." *Id.*, 234 F. 2d, at p. 135.

In the case at bar, if we assume *arguendo* that the words "AR 604-10 applies" will not appear on petitioner's corrected discharge certificate (R. 114), respondent, in the words of Judge Frank, will not have "aggravated" the "direct pecuniary harm" and the "social stigma" otherwise caused by the proffered "General" discharge. However, the absence of the words "AR 604-10 applies" on petitioner's discharge certificate means only that, instead of publicly proclaiming petitioner a "security risk," the Army says petitioner is either militarily inept, a homosexual, disloyal, or, perhaps, subversive.[5] In any event, the various comments made by Senators and officials of

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[4] *Id.*, 234 F. 2d 135, ftn. 3.

[5] This was made clear during the hearings before the Senate Sub-Committee on Constitutional Rights on the 18th day of November, 1955:

"Private Ross: I believe it had subversives and disloyal, because I looked that up. I know it had them. But I think it also had homosexuals, and so forth.

"Mr. Hocker: So that anybody who reads that paper—

"Private Ross: Will get the impression—

"Mr. Hocker: And then reads the certificate you give him, will have the choice of deciding whether you are subversive or disloyal or homosexual?

"Private Ross: That is right." (*Hearings, Sub-Committee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94*, 84th Cong., 2d Sess. p. 442).

the Department of Defense during the *Hearings* before the *Senate Committee on Armed Services on S. 3096,* 83rd Cong., 2d Sess., March 18, 24, April 1, 8, 1954, bear striking witness to the *substandard* character of the "General Discharge." See, *Hearings, id.,* at pp. 44, 45, 74, 75, 76, 128, 132, 133, 152, 153. As Senator Kefauver aptly stated:

> "Some might say that that doesn't mean much, but if they go to apply for a position or a job, and it is * * * any kind of discharge other than honorable, ordinarily they may as well not apply, because they are not going to get a job. You can do all the explaining in the world, but there isn't a chance, if it doesn't say 'honorable.'" *Id.,* at p. 153.

In the dissent below, Judge Bazelon pointed out that "[i]t may well be, as [respondent] states, that none of the benefits available to discharged soldiers under federal law are withdrawn from the holder of such a 'general' discharge as this. Many benefits are conferred, however, by the statutes of the State of New York, where [petitioner] resides, and those statutes all use the language 'honorable discharge' or 'honorably discharged.' Although the New York courts have not decided whether this excludes holders of a discharge entitled 'General (under honorable conditions),' the late Judge Frank of the Court of Appeals for the Second Circuit suggested that it would. * * * Nor is the new form of discharge defensible on the ground that the separation report does not on its face indicate that it was based on security considerations. The same observation could be made concerning the 'undesirable' discharge. In both instances, however, a person sufficiently interested to check army regulations would discover the 'security' character of the discharge." (Pet. App. 52-53).

In petitioner's case, the "General" discharge certificate inflicts even more damage. As a law student and prospective candidate for admission to the Bar of the State of New York (R. 2), the character of the proffered certificate erects a serious obstacle to petitioner's prospective career (R. 116-117).[6] Solely because petitioner engaged in non-criminal, constitutionally-protected conduct (which occurred primarily, if not exclusively, prior to induction), he is proffered a "General" discharge, although his exemplary record of military service clearly entitles him to an "Honorable" one. See, *AR 615-360, par. 8a.* In such circumstances, and where the "General" discharge jeopardizes petitioner not only in his profession, his job opportunities and reputation, but also extinguishes his right to valuable veterans' benefits provided by the laws of New York, we think it clear that legal injury has been suffered.[7]

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[6] Cf. Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480.

[7] Commenting on this very issue, the *Stanford Law Review* noted: "The Army has furnished ex-private Harmon with a 'general' discharge under honorable conditions, and the Government is now urging that the case has become moot. * * * With a minor exception giving preference to honorably discharged veterans in the appointment of federal court criers and bailiffs, 28 U.S.C. § 775 (1952), this will entitle him to the same federal veterans' benefits as he would have been entitled to under an 'honorable' discharge. * * * However, many state benefits hinge on an 'honorable' discharge. See Zearing v. Johnson, 10 Cal. App. 2d [illegible] 52 P. 2d 1019 (2d Dist. 1935); Horylev v. New York State Bonus Comm'n., 220 App. Div. 345, 221 N.Y. Supp. 548 (3d Dept. 1927). The plaintiff may suffer such losses in his home state. * * * The 'general' discharge by its very nature, and the report of separation since it indicates as authority for discharge the personnel security regulation, U.S. Army Reg. No. 604-10 Par. 19(b), will stigmatize him for life." *Judicial Review of Army Discharge Procedures*, 9 Stan. L. Rev. 170, 171 (Dec. 1956).

II

This Court will undoubtedly recognize that petitioner was discharged under the provisions of Department of Defense Directive 5210.9 (*Res. Br.* 4-5). Paragraph VIII(F)(6) of that Directive provides:

> "In the case of separation of any member of the Armed Services, under conditions outlined in the preceding sub-paragraph, the DD Form 214 (Report of Separation) will cite as authority the appropriate Armed Service directive under which separation is effected." (R. 43)

Respondent notwithstanding (*Res. Br.* 7-8), petitioner has not yet received a General Discharge Under Honorable Conditions. He has been offered one (R. 110-112). The DD Form 214 (Report of Separation) proffered petitioner does not contain the words "AR 604-10" in paragraph 8 thereof (R. 113). Nevertheless, the words "AR 604-10 SPN 82" are required to be cited in paragraph 8. See, *Army Regulation (AR) 604-10*, par. 19(b).[*] In other words, petitioner's "Official Report of Separation from the Armed Forces" is required by regulation to stigmatize peti-

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[*] Paragraph 19(b) of the Army's "security risk" directive (AR 604-10) provides:

> "The Report of Separation From the Armed Forces of the United States (DD Form 214) of members discharged under the provisions of these regulations will indicate in item 8: 'AR 604-10 APN 82.' The letter of separation and/or discharge certificate of officer and enlisted reservists not on active duty will indicate: 'AR 604-10 applies.' Members relieved from active duty or discharged prior to completion of an action under these regulations will have 'Paragraphs 9 and 20 (as appropriate), AR 615-120 applies' entered in item 38, DD Form 214."

tioner as a "security risk." *Schustack* v. *Herren* (2 Cir.), 234 F.2d 134, 135. Inasmuch as petitioner has not yet received the General Discharge Under Honorable Conditions proffered him on June 6, 1956, it must be presumed that respondent will correct this omission from petitioner's DD Form 214 in conformity with the requirements of Department of Defense Directive 5210.9, par. VIII(F)(6), and AR 604-10, par. 19(b). See, *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 142-143; *R. H. Stearns Co.* v. *United States*, 291 U.S. 54, 63; *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15.

Viewed in this light, respondent's assertion that petitioner has not suffered any judicially recognizable injury is little short of ludicrous, especially where, as here, Department of Defense Directive 5210.9 and AR 604-10 require petitioner's "Official Report of Separation from the Armed Forces of the United States" to bear the notation for all the world to see: "AR 604-10 [the security risk regulation] applies." In the context of popular opinion in this country today, it is difficult to conceive of a deeper stain, or greater infamy. *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191. With a "General Discharge" identified as a discharge under security regulations, it permanently stigmatizes a man with the concomitant result that he is barred for life from major areas of gainful employment.[9] A determination that an individual is a "secur-

[9] Rowland Watts, a leading authority in the field, has said with regard to the "General Discharge Under Honorable Conditions," that:

> "AR 615-360 states that, 'The effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefits.' While this is technically true under the letter of federal law, it is

ity risk" now renders it impossible for him to obtain employment in the Federal Government, or in state or local government; opportunities in private employment are either drastically diminished or completely extinguished. In many professional fields, such a person must abandon his life's work. Specific industries, such as the maritime, or the motion picture industry, or those industries engaged in work on Government contracts, are closed to him. Other industries unofficially

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not always true under varying state laws and is generally not true as far as private employment is concerned. As the discharge certificate in these cases has typed on it '[AR 604-10] applies'—which only means 'Disloyal and Subsersive'—it is an effective bar to all public employment, virtually all defense industry employment, and most other private employment where the discharge certificate has to be shown. It is generally recognized that a General discharge is 'sub-standard.' In the absence of the 'Disloyal and Subversive' identification, it is used in such cases as military ineptitude or minor manifestations of homosexual propensities. The Army is so aware of its lesser value that the regulations provide: 'Notwithstanding the foregoing criteria * * *, when disqualifying entries in the individual service record during current service are outweighed by subsequent honest and faithful service over a greater period of time, an honorable discharge may be furnished. * * * In addition, careful consideration will be given to the nature of the offenses and sentence adjudged by a court-martial in applying the provisions of *a*(3) and (4) above, and when, in the opinion of the officer effecting discharge, these have been not too serious and severe, and the remainder of the service in the enlistment has been such that an honorable discharge would have been granted had the conviction not occurred, an honorable discharge certificate may be awarded.' (AR 615-360, par. 8b.) * * * Yet the General discharge has become the general dumping ground for all those against whom security charges are brought although the charges have not been 'proved' even by the Army's dubious standards of proof. It is the Army's way of creating the label of 'Almost Subversive.'" Watts, "*The Draftee and Internal Security, A Study of the Army Military Personnel Security Program*," (New York, 1955), pp. 80-81.

refuse to admit him, and if he were to attempt to secure employment in a foreign country, he would find it difficult to secure a passport. On the personal level, his reputation is blighted and the social status of his family impaired. Marked for life, his reputation as well as his ability to earn a livelihood is seriously jeopardized. So far as the public is concerned, the term "security risk" is synonymous with "traitor."[10]

If, as respondent contends, the legal effect of a "General (under honorable conditions)" discharge is the same as an "Honorable" one, there is now no reason for denying petitioner the "Honorable" discharge he seeks. Only then can respondent successfully argue that petitioner has not suffered an injury cognizable by this Court. *Perkins* v. *Elg*, 307 U.S. 325, 349-350; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; *Peters* v. *Hobby*, 340 U.S. 331, 347.

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[10] See, *e.g.*, *Hearings, Senate Sub-Committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., June 3, 9, 23, August 30, 21, 1955 at pp. 67, 121-122, 130, 271, 550, 573, 599, 627. See also: *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94*, 84th Cong., 2d Sess., November 18, 22, 1955, pp. 361-362, 393-394, 526-527.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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